Supreme Court of the United States

OCTOBER TERM, 1960.

No. 9

JOSEPH LLOYD THOMAS,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Joseph Lloyd Thomas prays that a Writ of Certiorari issue to review the judgment entered in this case on March 2, 1961 by the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW.

The District Court did not render an opinion. The original opinion and the opinion on re-hearing of the Court of Appeals have not been reported but are appended.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 2, 1961. A petition for re-hearing was denied on April 4, 1961. On April 28, 1961, this court granted petitioner an extension to May 15 to file this petition. The jurisdiction of this court is invoked under Title 28, U. S. Code, Section 1254 (1).

QUESTIONS PRESENTED.

1. Did the Court of Appeals err in holding that it was harmless error for the trial court in the presence of the jury to threaten repeatedly an alleged accomplice, called as a Government witness, with a perjury prosecution and parole board retribution if he did not change his testimony to conform with his written confession which incriminated the defendant?

2. Did the Court of Appeals err in holding that it was harmless error for the trial court to order the repudiated confession of an alleged accomplice admitted to the jury?

3. Did the Court of Appeals err in refusing to apply the test of "harmless error" as set forth by this court in *Kotteakos vs. United States*, 328 U. S. 750, 66 Sup. Ct. 1239 (1946)?

STATUTES INVOLVED.

18 U. S. Code 2113 (a) and (d). See Appendix.

Rule 52, (b), Federal Rules of Criminal Procedure. See Appendix.

STATEMENT OF THE CASE.

The defendant Joseph Thomas was indicted and convicted of violating 18 U. S. C. 2113 (a) and (d) on February 13, 1958, by putting in jeopardy the employees of the Commercial National Bank, Youree Drive Branch, Shreveport, Louisiana, whose deposits were insured by the F.D.I.C., and taking from their presence the sum of $34,498.35 belonging to the bank. R. 2-3.

Indicted with the petitioner were Cecile Angelly and Thomas Polcyn. Prior to the trial, these two accused pleaded guilty and were sentenced.

About 12:30 p.m. on February 13, 1958, two men entered the Commercial National Bank, Youree Drive Branch, Shreveport, La. They pulled guns, and one of the men said, "This is a holdup". He then went behind the counter to fill a paper bag with money and fired a shot at the floor which ricocheted and struck a bank employee in the finger. R. 54, 67.

After the robbery, the two men made their getaway in a car driven by a third man. R. 43. Testimony as to the time during which the men remained in the bank varied from a few to ten minutes. R. 71, 80.

About a month later, three F. B. I. Agents questioned petitioner for about three or four hours at Fort Worth, Texas, where he was living with his wife and family.

R. 272, 274, 327. Although he admitted knowing Polcyn and Angelly as a result of business dealings in surplus property, he steadfastly denied any participation in the robbery. R. 260.

There is a contradiction in the evidence as to whether the agents threatened the petitioner with a prosecution for income tax evasion for failing to file returns. Petitioner testified that such threats were made, which was denied by one of the agents, and because of a fear of arrest and a prior criminal record, he moved to Pelzer, S. C., under a different name where his family joined him. R. 274, 275-276, 279.

In the meantime, the F. B. I. was showing a picture or pictures of the accused to the bank employees. There is also a contradiction in the testimony of these employees as to the circumstances under which they viewed and allegedly identified these photographs.

One of the bank employees testified she was shown the photographs *a whole month before they were admittedly taken*. R. 69, 322, 324.

Another employee testified very definitely that she was shown *only photographs of the petitioner*. R. 55, 59. Thereafter, via leading questions by the Government, she contradicted herself by testifying she was shown photographs of other persons as well and selected his picture from a group of pictures. R. 66.

The identification testimony was to the effect that the two men who entered the bank were Cecile Angelly and petitioner.

Polcyn allegedly drove the car in which they left the scene.

From the time of the robbery until the date of the trial, over two and a half years elapsed. For twenty days in the latter part of December, 1959, the defendant was in custody at Shreveport. Yet, except for the fleeting moments they allegedly saw him during the robbery, the identification witnesses never saw the petitioner in person until they walked in the courtroom. R. 281.

After the identification testimony had been adduced, the Government as a part of its case in chief called the alleged accomplice Cecile Angelly to testify against the defendant. However, Angelly denied any participation in the crime. R. 102.

Instead of removing the witness, the Government pleaded surprise. R. 102. When the defense objected to the plea of surprise, the trial court ordered the Government to state the circumstances of the surprise. R. 104.

The Government, instead of stating merely the circumstances of its surprise, immediately laid before the jury all of the details of an alleged verbal confession by the witness clearly incriminating the petitioner. This was followed up with a statement that the Government

also had the witness's written confession which was to be used for impeachment purposes upon the sustaining of the plea of surprise. R. 103-104.

The trial court not only sustained the plea of surprise, but also ordered the Government to question the witness as to the veracity of each sentence of the written confession. R. 109, 111.

When the witness proceeded to deny these statements, the trial court threatened him repeatedly in the presence of the jury with prosecution for perjury and parole board retribution if he did not adhere to his written confession which incriminated the defendant. R. 105, 135-136.

After Angelly left the stand, the Government called the other alleged accomplice, Thomas Polcyn. The trial court refused to allow this man, who was 98% deaf, to have his attorney present during his testimony. R. 141.

The trial court also threatened him with a perjury prosecution. R. 141. The Government also had his written confession, which he claimed was obtained by promises. R. 172, 148-151. This confession was marked "G-7" and also used against petitioner with the approval and aid of the trial court who suggested that it be given to the witness to read to refresh his memory. R. 147-148, 154, 155.

There is no record showing the memory of this witness needed refreshing. But the denial of Angelly was still

fresh in the mind of the Government and the court. In this setting the trial court and Government elicited testimony from Polcyn incriminating petitioner. R. 147.

In defense of his innocence, the defendant took the witness stand. Steadfastly he denied any complicity in the crime. R. 282-283; see also R. 379.

As his principal witness petitioner produced a married woman of Fort Worth with whose husband he had business dealings. She testified that on the date and at the time of the robbery she was having coffee in Fort Worth with petitioner who wanted to pick up some merchandise which her husband was storing for him. R. 211-212.

The witness recalled the date by reference to the fact that her son fought in the Golden Gloves boxing tournament that night. To verify her memory she examined and produced newspaper clippings showing the date of the tournament. R. 217.

Despite a vigorous cross-examination by the Government and the trial court (R. 216-217, 223, 227-229) coupled with threats to impeach her testimony with contrary evidence by F. B. I. Agents as to what she had previously told them, this witness persisted in her alibi statements, although admitting at the end of her evidence, on continuous cross-examination by the court, that anyone could be mistaken, but she was still pretty sure she saw the petitioner in Ft. Worth on Feb. 13, 1958.

The threats to impeach her testimony by F. B. I. Agents collapsed when the agent in question refused to go along with the contention that she had made a contrary statement. R. 335, 336.

Trial was held on June 13 and 14, 1960, in the U. S. District Court for the Western District of Louisiana. On June 14, 1960, the jury returned a verdict finding petitioner guilty as charged.

On their pleas of guilty, the alleged accomplices, Angelly and Polcyn who had a bad record (R. 165-170), were sentenced to prison terms of fourteen (14) years and eighteen (18) years respectively. R. 82. On June 22, 1960, the petitioner was brought before the trial court for sentencing. His record was not bad, and he was forty-eight (48) years old.

The trial court told the petitioner that if he would confess to participating in the crime, the court would take that into account in imposing sentence. Upon his refusal to do so, the court imposed the maximum prison sentence of twenty-five (25) years. R. 378, 379.

REASONS FOR GRANTING THE WRIT.

Petitioner avers that a writ of certiorari should issue herein for the following reasons:

(A) In holding that the threats of prosecution for perjury directed by the trial court to a reluctant government witness, in the presence of the jury, constituted

harmless error, the Court of Appeals has decided a point which has not been, but should be, decided by this Court;

(B) In holding that the admission in evidence of the repudiated confession of an alleged accomplice was harmless error, the Court of Appeals has ignored the test of harmless error as set forth by this court in *Kotteakos v. United States*, 66 S. Ct. 1239, 328 U. S. 750 (1946);

(C) In holding that it was harmless error for the judge to threaten an alleged accomplice with perjury prosecution, in the presence of the jury, and in holding that the admission of his repudiated confession incriminating petitioner, was harmless error, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

ARGUMENT.

I.

As noted by the Court of Appeals in its opinion on refusal of re-hearing, petitioner was represented at the trial by different counsel than on appeal.

Because of an alleged lack of objections by trial counsel to what was obviously erroneous procedure, the Court of Appeals declined to weigh the seriousness of the prejudicial errors committed:

> "So much of our system of administration of justice depends on the right to counsel, and courts so

> frequently hold an accused to be bound by decisions and judgments made by counsel in the conduct of criminal trials, that we should not lightly determine that counsel in a case such as this quietly sat by *while clearly inadmissible evidence was being introduced against* their client without objection unless they had a good reason for doing so." Orig. Op., p. 5. (Emphasis added).

The "clearly inadmissible evidence" referred to by the court consisted of the reading before the jury of the confession by Angelly, who repudiated it as being untrue and having been made under duress. R. 139, 140. The reading of the confession, sentence by sentence, and the denial of nearly all of it by Angelly, consumed some thirty-five pages of the record. R. 105-140.

The Court of Appeals concedes that the admission of this entire confession was erroneous and contrary to the rule laid down by this same Court of Appeals in *Culwell v. United States*, 97 F.2d 200. Orig. Op., p. 4. The Court of Appeals *assumes that no objection was made to the introduction* of this confession.

In this assumption the court was clearly in error because the record shows that when the witness Angelly denied participation in the robbery, the prosecuting attorney pleaded surprise, whereupon counsel for defendant stated:

> "Your Honor, I don't see how the district attorney can plead surprise when he has had this man locked up in the jail."

"THE COURT:

"State the circumstances of your surprise Mr. Wilson.

"MR. WILSON:

"Yes, Your Honor. On Tuesday, July .... I have to get the calendar.

"THE COURT:

"Last Tuesday?

"MR. WILSON:

"Last Tuesday, yes, June 7, Mr. Angelly was in the office of the United States Attorney, in my presence and in the presence of Mr. Perkins and Mr. Lester Jordan, deputy United States Marshal, and Special Agent Thurmon P. Kelley of the F. B. I." (Then follows the highlights of the confession in Mr. Wilson's unsworn statement, under the direction of the court, squarely implicating petitioner). R. 103.

From the above it will be noted that, after his initial objection, counsel had precious little time to object. If he had objected, he would have been objecting to what the court was ordering because the court had commanded the prosecuting attorney to state the basis of his surprise. And when the contents of the confession itself were read to Angelly, this likewise was done under the command of the court:

"MR. WILSON:

"May we read this statement to the Court?

"THE COURT:

"I will permit you to ask him if he did not make such statements. *Read it to him sentence by sentence.*" R. 109.

Petitioner avers, therefore, that the Court of Appeals was in error in assuming that no objection was made, *because an initial objection was clearly made.* The mere fact that it was perhaps not stated as articulately as possible does not rob it of its intended effect which was to protest against the attempt to get in the repudiated confession under the guise of impeaching the witness.

Petitioner further shows that the failure to repeat the initial objection may well be understood in view of the fact that the procedure of reading the confession to the witness sentence by sentence *was ordered by the court* when he directed the prosecuting attorney to, "Read it to him sentence by sentence." R. 109; see also R. 111.

This failure to repeat the objection, after the court had directed emphatically that the confession be read sentence by sentence, may well be understood by the natural reluctance of counsel to object unnecessarily and repeatedly to what the court had already ordered.

This attitude was well stated by the Fifth Circuit Court of Appeals in *Gomila v. United States*, 146 F. 2d 372, where a reversal was ordered because the court took an overactive part in the examination of witnesses. No objections had been made. In excusing this lack of objections the Fifth Circuit noted that, "if they (defense counsel) make objections, unlike the effect of objections to questions by opposing counsel, it will appear to the jury that there is direct conflict between them and the Court."

Thus, under the highly technical interpretation that no proper objection was made, the Court of Appeals has ignored the effect of an illegally admitted confession *which the court admits was inadmissible.* Orig. Op., p. 5. It excuses its failure to regard the highly prejudicial effect of such confession by assuming that counsel below must have "had a good reason" for not objecting. Orig. Op., p. 5.

The "good reason" for not objecting further may well have been the conclusion by counsel below that the initial objection, when the plea of surprise was first made by the Government, was sufficient and that no further objection was necessary.

To assume, as the court does, that there was any other possible reason or hidden strategy in allowing the prosecution to drag before the jury a detailed confession implicating petitioner is the wildest sort of speculation. The reading of this repudiated confession was not only highly prejudicial but its impact was heightened considerably by the hostile action of the court in *threatening the witness with perjury twice when he refused to acknowledge the truth of the confession.*

In the alternative, and in the event that this court should hold that the objection made was insufficient to preserve the point, petitioner submits that the admission of this lengthy, detailed and highly prejudicial confession, under guise of pleading surprise, was an error of such magnitude that its prejudicial effect should be

noted, despite lack of adequate objection, under Rule 52 (b) of the Federal Rules of Criminal Procedure.

Petitioner submits that any confession implicating the defendant is bound to have highly prejudicial effect and its mere illegal admission is grounds for reversal despite the adequacy of other evidence to convict. *Payne v. Arkansas*, 356 U. S. 560, 78 S. Ct. 844, 2 L. Ed. 975 (1958).

II.

During the repeated denials by Angelly of the alleged confession, which was read to him sentence by sentence, the court twice brought up the threat of a perjury prosecution plus parole board retribution if he continued to deny the confession:

"THE COURT:

"I also will take this occasion to warn Mr. Angelly that he is under oath and that if he falsifies, he will be subject to prosecution for perjury.

"In that connection I remind you, Mr. Angelly, that you previously, on August 4, 1958, entered a plea of guilty to this charge of bank robbery and was sentenced by the Court at a later date. *Keep that in mind from now on.* In other words, if you commit perjury while you are on the witness stand here today—you know what perjury is, don't you?

"THE WITNESS:

"Yes, sir.

"THE COURT:

"False swearing. YOU CAN AND PROBABLY WILL BE PROSECUTED FOR PERJURY. WHAT

IS THE MAXIMUM SENTENCE FOR PERJURY, MR. WILSON?

MR. WILSON:
"Five years, Your Honor.

"THE COURT:
"Proceed." R. 105.

The process of getting before the jury the repudiated and hearsay confession of Angelly, sentence by sentence, consumed nearly thirty five pages of the record and toward the close of this phase the court again injected himself into the matter:

"THE COURT:
"Why did you plead guilty to the bank robbery?

"THE WITNESS:
"The FBI put the statement to me and used threats if I didn't sign the statement.

"THE COURT:
"When you were in Court and entered your plea of guilty, didn't I ask you expressly whether or not anybody connected with the government had in any way made any promises or threats or otherwise brought any pressure against you to enter your plea of guilty? You remember that?

"THE WITNESS:
"Yes, sir.

"THE COURT:
"And you told me they had not done so?

"THE WITNESS:
"Yes, sir.

"THE COURT:

"You are now saying they did so?

"THE WITNESS:

"Yes, sir.

"THE COURT:

"It is pretty late to change your mind?

"THE WITNESS:

"Yes, sir.

"THE COURT:

"*You still got all this time ahead of you?*

"THE WITNESS:

"Yes, sir.

"THE COURT:

"*You know the parole board is likely to consider what is going on here today?*

"THE COURT:

"*And you are likely to be prosecuted for perjury?*

"THE WITNESS:

"Yes, sir." R. 135.

Despite the obviously prejudicial effects of the above threats of prosecution for perjury, the Court of Appeals disposed of these errors in less than one sentence by simply noting:

> "* * * it is sufficient to say that counsel took no objection to the questions asked, took no exception to the action of the trial court in participating in the trial and made no motion for a mistrial for any of the actions which appellant now contends were in error and prejudicial to him." Orig. Op., p. 6.

The failure to object to the questions propounded by the judge is certainly excusable in view of what was said by the Fifth Circuit Court of Appeals in the *Gomila* case, *supra*, p. 12. Moreover, even in the absence of an objection, the repeated and hostile action of the court in practically demanding that the witness acknowledge the confession which squarely implicated petitioner was plain error and grounds for reversal. Rule 52 (b), Federal Rules of Criminal Procedure.

Threats of this kind, including actual orders for arrest for perjury, are generally held grounds for reversal in those jurisdictions where the court has no right to comment upon the evidence. See 127 A. L. R. 1394. Although this court has not, to the best of petitioner's knowledge, passed upon the identical point raised here, the Court of Appeals for the Second Circuit has held it reversible error for a trial judge, in an effort to compel witnesses to testify, to remind them that he was to sentence them later in their respective cases. See *U. S. v. Marzano*, CCA 2d, 1945, 149 F. 2d 923.

Petitioner avers, therefore, that for this additional reason, certiorari should issue herein in order that there be a definite declaration by this court as to whether, and under what circumstances, a trial court may threaten a witness before a jury with a perjury prosecution and parole board retribution.

Such threats by a judge, directed to a witness who refuses to implicate a defendant, *amount in the eyes of the jury to a demand for conviction.*

Petitioner further avers that, if such procedure is permissible, the bar is entitled to be so informed by this court. If it is not permitted, an error of this obvious magnitude should be declared by this court to be plain error and grounds for reversal.

III.

Petitioner avers that the Court of Appeals erroneously relied upon the case of *Lutwak v. United States*, 344 U. S. 604, 619, as setting forth the test for "harmless error". Orig. Op., pp. 7-9. This case is not a leading authority on the subject of harmless error, and the point was only briefly discussed. In *Lutwak* the Supreme Court said:

> "In our search of this record, we have found *only one instance* where a declaration made after a conspiracy had ended was admitted against all of the alleged conspirators, even though not present when the declaration was made. Was the admission of this *one item of hearsay evidence* sufficient to reverse the case?
>
> "We think not. In view of the fact that this record fairly shrieks the guilt of the parties, we cannot conceive *how this one admission could possibly have influenced the jury to reach an improper verdict.* A defendant is entitled to a fair trial but not a perfect one." (Emphasis added.)

Petitioner submits that in *Lutwak*, *supra*, this court was dealing, not with the effect of what it deemed substantial error, but with one item of hearsay evidence which the court found insubstantial in its effect.

In referring to *Lutwak, supra*, the Court of Appeals ignored the true test for harmless error as laid down by this court in *Kotteakos v. United States*, 66 S. Ct. 1239, 328 U. S. 750. In discussing the test for harmless error this court declared:

> "'And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. *The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own*, in the total setting. Cf. United States v. Socony Vacuum Oil Co., supra, 310 U. S. at pages 239, 242, 60 S. Ct. at pages 851, 853; Bollenbach v. United States, supra, 326 U. S. 614 66 S. Ct. 406. * * *
>
> " . . . And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. *This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.*" (Emphasis added.)

The court below erroneously declined to apply the test set forth in the *Kotteakos* case. Instead the court assumes that, where there is strong proof of guilt, *all error is harmless*, and there can be no reversal. Orig. Op., pp. 8, 9.

Such an approach to the problem of reversible error, or its converse, harmless error, strikes radically at all established concepts of due process in our Anglo-Saxon system of trial by jury. Followed to its logical con-

clusion it amounts to substituting an appellate court for a jury. This concept of harmless error, if sanctioned by this court, can doubtless simplify our appellate procedure in criminal matters but the simplification will consist of scrapping all pretense of procedural safeguards and asking only one question: "But wasn't he guilty anyway?"

IV.

Petitioner further avers that not only did the Court of Appeals apply a false test as to harmless error, but also the theory of the court is based upon the false premise that the case against petitioner was "overwhelming". Orig. Op., p. 9.

Initially, it is noted that an alibi witness testified that petitioner was at Fort Worth, Texas discussing a business matter with her on the day and hour of the bank robbery. This witness remembered the date because her son fought in the Golden Gloves boxing tournament that night. R. 211-212, 214.

As to the five eye witnesses to the robbery who testified they were able to identify the petitioner, none of these witnesses had seen the petitioner before the trial, except for the time they allegedly saw him for only a few minutes during the robbery over two and a half years earlier.

Although petitioner was in custody at Shreveport for twenty days, during which time there was ample opportunity for personal identification, for some unexplained

reason the Government never permitted these witnesses to take even one look at him. On this questionable basis the Government's demand for a conviction rested until they whipped in Angelly's confession.

The value of the eye witness identification was further lessened by the Bank's apparent instructions to their employees not to discuss the case with petitioner's attorneys. R. 86-87. Added to this factor was an admitted "dress rehearsal" before trial of all of the bank witnesses in the presence of each other. R. 47.

As a result, many factors could well have shaken the faith of the jury in the accuracy of the identification. Never is an "overwhelming" case made out on identification testimony resting on a fleeting glimpse of an accused under circumstances of great personal stress.

The jury may well have elected to believe the testimony of petitioner's witness who placed him in Fort Worth at the time of the robbery and who had nothing to gain from testifying in the case.

Without the wholly unorthodox procedures contrived by the Government to get illegal evidence before the jury, no one can be sure that the trial would have taken the same course or ended in the same result.

The Government's appreciation of the fact that the case against petitioner without the illegally admitted evidence was not overwhelming is proved by their recorded zeal and tenaciousness in unjustly maneuvering the con-

fession into evidence before the jury and relying upon it in arguing for a conviction. R. 103-141, 359-360.

The trial judge's realization of this same fact is proved by his assuming the role of prosecutor and throwing the weight of his office into the balance against petitioner. R. 104-105, 111, 135-136, 141.

Due to the lack of prior confrontation of the petitioner by the eyewitnesses and "remote-control" identification by photographs, the Government knew its case was shaky. For that reason Angelly's confession was necessary to bolster the case. Otherwise, why did the Government use it!

Therefore, if these unorthodox procedures, which the court below has admitted are clearly erroneous, are not declared by this court in forthright terms to be gravely prejudicial, the decision herein will set a precedent for a "laissez-faire" system of criminal procedure in which incalculable mischief will result while the phrase "harmless error" absolves all offenses against due process.

V.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this court for its review and determination on a day certain therein named, a complete transcript of the proceedings of that court herein, being the case numbered

and entitled in its docket as "Thomas v. United States of America, No. 18,445" and that the judgment of that court be reviewed by this court, and for such relief as this court may deem proper.

New Orleans, La., May 9, 1961.

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New Orleans, Louisiana,
EDGAR COREY,
Attorney at Law,
National Bank of Commerce Building,
New Orleans, Louisiana.

CERTIFICATE.

I certify that I am a member of the Bar of this Court and that copies of this document were served this date upon the Solicitor General of the United States, Department of Justice, Washington, D. C., and the United States District Attorney for the Western District of Louisiana, Post Office Building, Shreveport, Louisiana, by depositing same in a U. S. Post Office with first class postage prepaid, addressed to them at their post office addresses.

New Orleans, Louisiana, May 9, 1961.

.....
HERBERT GARON.

APPENDIX.

18 U. S. C. 2113. "Bank Robbery and Incidental Crimes.

"(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

"Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States or any larceny—

"Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

* * * * * * * *

"(d) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both."

"Rule 52. Harmless Error and Plain Error:

"(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

"(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Federal Rules of Criminal Procedure.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18445

JOSEPH LLOYD THOMAS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

(March 2, 1961.)

Before TUTTLE, Chief Judge, HUTCHESON, Circuit Judge, and CLAYTON, District Judge.

TUTTLE, Chief Judge: This appeal from a verdict of guilty and maximum sentence under the Bank Robbery

Statute[1] presents a record which is bare of any attempt by counsel for the appellant to call to the attention of the trial court any of the alleged errors which are here relied on for reversal.

[2] Appellant was convicted of participating with two others in the robbery of a bank in Shreveport, Louisiana, by a threat of violence by the use of a dangerous weapon. On his trial he was identified by five eyewitnesses to the robbery and his participating in the offense was further testified to by an accomplice who had previously pleaded guilty. The evidence supporting the jury's verdict was overwhelming. The only defense was alibi, testified to by the accused himself and by two casual acquaintances whose testimony was itself somewhat shaken on cross examination. The strength of the case made against the accused by the government is commented on in light of the fact that under familiar rules Courts of Appeals do not review actions of omission or commission by a trial court unless the accused "makes known to the court the action while he desires the court to take or his objection to the action of the court and the grounds therefor." Rule 51, F.R.Cr.P. In order to overcome the provisions of Rule 51 appellant must bring himself within the "plain error" rule, which provides, "Plain errors or defects affecting substantial right may be noticed although they were not brought to the attention of the Court."

The principal ground of appellant's argument here is the action of the trial court which followed a surprise

[1] 18 U.S.C.A. §2113(a) and (d).

change of position by one Angelly who had previously pleaded guilty as an accomplice and who had given a sworn detailed confession prior to the trial. As the trial progressed the United States Attorney caused Angelly to be sworn as a witness for the prosecution.

[3] "BY MR. WILSON:

Q. Would you state your name for the Court and jury?

A. Cecle Ray Angelly.

Q. Mr. Angelly, it has been the testimony of five eye witnesses here that two robbers entered the Youree Drive Branch of the Commercial National Bank in Shreveport on February 13, 1958, and robbed that bank of better than $34,000. Did you participate in that robbery?

A. No, sir.

Q. What?

A. No, sir.

MR. WILSON: May it please the Court, I would like to plead surprise at this time and impeach the witness.

May I have the authority to cross examine him?

MR. HAYES: Your Honor, I don't see how the District Attorney can plead surprise when he has had this man locked up in the jail.

THE COURT: State the circumstances of your surprise, Mr. Wilson?"

The prosecuting attorney very clearly stated facts establishing that he had been completely taken by surprise by Angelly's denial that he participated in the

robbery. Thereupon, the trial court warned Angelly that he was under oath and that he would be subject to prosecution for perjury if he swore falsely, and he then permitted the United States attorney to question this witness on each statement of his prior written confession: He read each sentence and asked Angelly whether he made the statement and after Angelly an-
[4] swered "No", he then asked him, "Is it true?". To all the material questions Angelly stated that he did not make the statement and that the statement was not true. During the course of the questions, however, he did say he knew the defendant and he also interjected, "I will testify again, neither Joe Thomas or I robbed the bank. That is all I will say."

Angelly did admit that he had initialed each page of the statement and had signed it, but he persisted in his denial of the truth of the statement which purportedly was executed under oath.

As we have stated, defense counsel made no objection to the questioning of Angelly, except by making the remark, "Your Honor, I don't see how the District Attorney can plead surprise when he has had this man locked up in the jail."

Inasmuch as Angelly had made no statement from the witness stand hurtful to the Government's case at the time the United States Attorney was taken by surprise, the proper procedure, if objection had been made, would have been for the witness to have been withdrawn before he was permitted to give any further testimony.

This court has held in *Culwell v. United States*, 5th Cir., 194 F.2d 808, 810, that "Where there is a real surprise, it is not proper to permit the impeaching testimony to go beyond the only purpose for which it is permissible, i.e., the removal of the damaging effect the surprise has caused." See also *Young v. United States*, 5 Cir. 97 F.2d 200.

[5] If to the first question Angelly had answered that the accused had not participated in or been present at the scene of the crime, some cross-examination would have been permissible to attack his credibility on the strength of Angelly's prior sworn statement to the contrary. This would be necessary in order to remove the damage the surprise caused.

Here, however, no damaging testimony was given until after much of the incriminating statement had been read to the witness. The Government was thus permitted to prove by the witness that he had signed a complete confession implicating the appellant but that he now repudiated it.

So much of our system of administration of justice depends on the right to counsel, and courts so frequently hold an accused to be bound by decisions and judgments made by counsel in the conduct of criminal trials, that we should not lightly determine that counsel in a case such as this quietly sat by while clearly inadmissible evidence was being introduced against their client without objection unless they had a good reason for doing so.

In light of the clear and convincing proof already introduced by eye witnessses to the robbery which overwhelmingly identified Thomas as the guilty person counsel may well have considered that the only manner in which they could create reasonable doubt in the minds of the jury was by permitting the government to ask question after question of Angelly, touching on his [6] purported complicity in the crime and having him deny categorically on each occasion that he knew anything about it.

The admission of evidence which is charged to be error in this case was not an inadvertent or hard to notice event that might have slipped by the observation of court or counsel. Some 35 pages of printed record are taken up with questions and answers touching on this repudiated confession. We think it perfectly clear that were we to reverse the judgment on account of this occurrence, it would be because the appellate court felt it proper to substitute its judgment for that of trial counsel as to trial tactics.

Other errors alleged to have occurred deal with the nature of the cross examination of defendant's witness, the participation by the trial court in the examination of witnesses, the failure of proof as to ownership of the stolen money and a failure of the court to charge with respect to certain of the matters in issue.

As to the conduct of the trial prior to the submission of the case to the jury, it is sufficient to say that counsel made no objection to the questions asked, took no ex-

ception to the action of the trial court in participating in the trial and made no motion for a mistrial for any of the actions which appellant now contends were in error and prejudicial to him.

As to the asserted failure of the proof as to the ownership of the money in the bank, we think that such [7] failure, even if attacked by motion to acquit (See *Lambert v. U. S.*, 5th Cir. 101 F.2d 960) would not be vital since proof of the ownership of the money by the bank was not a part of the gravamen of the offense. See *England v. U.S.*, 5th Cir., 174 F.2d 466.

Appellant says with respect to the alleged deficiencies of the court's charge, "Although anyone of the above (omissions) standing alone might be insufficient to constitute error, see Hoback v. U.S. 284 Fed. 529, taken as a whole they show the jury was not properly charged because the instructions woefully failed to cover the issues in the case." Again, appellant seeks a reversal on a ground with respect to which his counsel utterly failed to preserve any alleged errors in the way provided by the Federal Rules. Rule 30 F.R.Cr.P., provides: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." We have recognized and enforced this rule most recently in *Tomley v. U.S.*, 5th Cir., 250 F.2d 549.

We now come to a consideration of appellant's argument that notwithstanding the failure by his counsel

to comply with the rules touching on the raising of points of error in the trial court, we should nevertheless notice them and reverse the judgment of conviction. As we noted initially, the record in this case, "shrieks the guilt of the parties." *Lutwak v. U.S.*, 344 U.S. 604, 619. In such a situation, the United States Supreme Court has seen fit to affirm judgments of conviction, even [8] where objection was properly made in the trial court, by applying the first paragraph in Rule 52. This paragraph provides, "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The Supreme Court places its consideration of such a case on the strength of the case made against the accused. In *Lutwak*, the Court said: "A defendant is entitled to a fair trial, but not a perfect one. This is a proper case for the application of Rule 52(a) of the Federal Rules of Criminal Procedure. We hold that the error was harmless." Page 620.

In *Krulewitch v. U.S.*, 336, U.S. 440, the Court held that it could not say that "The erroneous admission of the hearsay declaration may not have been the weight that tipped the scales against petitioner." This was true, as the Court said, because in that particular case, "The record persuades that the jury's task was difficult at best." In *Hawkins v. U.S.*, 358 U.S. 74, the Court again pointed out the closeness of the case and there said: "We cannot be sure that her evidence, though in part cumulative, did not tip the scales against petitioner on the *close* and vital issue of whether his prime motivation in making the trip was immoral."

Since the Supreme Court considers it appropriate to consider the strength or weakness of the government's case in determining whether error, even where called to the trial court's attention, affects "substantial rights" of the accused, it seems clear that the same consideration to the strength of the government's case should be given when we are asked to ignore the requirements [9] of Rule 51 and Rule 30, because the alleged errors "affect substantial rights." This then gives a plain answer in a case such as this where the proof of guilt was overwhelming and the utter failure of trial counsel to permit the trial court to pass on the points at issue may have been due to their chosen trial tactics.

The judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1960.

No. 18,445.

D. C. Docket No. 15,067 Crim.

JOSEPH LLOYD THOMAS,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

Before TUTTLE, Chief Judge, HUTCHESON, Circuit Judge, and CLAYTON, District Judge.

JUDGMENT.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 2, 1961.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18,445.

JOSEPH LLOYD THOMAS,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

(April 4, 1961.)

ON PETITION FOR REHEARING.

Before TUTTLE, Chief Judge, HUTCHESON, Circuit Judge, and CLAYTON, District Judge.

PER CURIAM: The motion for rehearing is denied. Since we did not make it clear, in the original opinion, that present counsel for appellant did not participate in the trial, we think it only appropriate to make it clear that the failure to preserve the asserted errors below, whether through inadvertence or as a part of trial tactics, is in no way attributable to counsel on appeal.

ORDER DENYING REHEARING.

Extract from the Minutes of April 4, 1961.

No. 81,445.

JOSEPH LLOYD THOMAS,

versus

UNITED STATES OF AMERICA.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.